**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
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| Implementation of Section 103 of the STELA Reauthorization Act of 2014 | ) | MB Docket No. 15-216 |
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| Totality of the Circumstances Test | ) | |

# COMMENTS OF MEDIA GENERAL, INC.


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## COMMENTS OF MEDIA GENERAL, INC.[1]

### I. INTRODUCTION AND SUMMARY.

Media General owns and operates broadcast television stations in 48 markets and is one of the nation's largest connected-screen media companies. In the 1992 Cable Act and he Satellite Home Viewer Improvement Act of 1999 ("SHVIA"), Congress prescribed a very limited, non-substantive role for the Commission in retransmission consent negotiations: get the parties to the table and ensure an honest, purposeful, and clear process.[2] The FCC's good faith rules promulgated under this light-touch directive have preserved an efficient retransmission market and yielded the successful negotiation of thousands of retransmission consent agreements with mutually beneficial terms and conditions that reflect the high-quality sports, entertainment, and news programming produced and obtained by local broadcasters.

[1] Media General, Inc. ("Media General") hereby submits comments in response to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding. *See Totality of the Circumstances Test*, Notice of Proposed Rulemaking, FCC 15-109 (rel. Sept. 2, 2015) ("NPRM").

[2] *Implementation of the Satellite Home Viewer Improvement Act of 1999*, 15 FCC Rcd 5445, ¶ 24 (2000) ("*Good Faith Order*") ("We believe that, by imposing the good faith obligation, Congress intended that the Commission develop and enforce a process that ensures that broadcasters and MVPDs meet to negotiate retransmission consent and that such negotiations are conducted in an atmosphere of honesty, purpose and clarity of process.").

At its core, the NPRM sets forth numerous proposals that (A) the FCC does not have the authority to enact and (B) would nevertheless harm consumer welfare. Media General and its stations are party to and fully support the comments of the National Association of Broadcasters and joint comments of the Affiliate Associations. While those comments will address each of the NPRM's proposals, the instant comments set forth the statutory limitations on the Commission and show the deficiency of certain aspects of the NPRM.

Congress' instruction to simply "review its totality of the circumstances test" as part of the STELA Reauthorization Act of 2014 ("STELAR") does not serve to enlarge the agency's procedural function, and the NPRM's proposals must be viewed through this lens.[3] More specifically, and contrary to the NPRM's posture:

- STELAR did not authorize the agency to invent new *per se* violations as determinative factors in the totality of the circumstances test;
- Congress did not amend Section 325(b)(1) of the Communications Act to authorize carriage absent a station's consent;
- Congress has not authorized the Commission to force the parties in a retransmission consent negotiation to agree to terms; and
- Congress has not authorized the Commission to regulate Internet content, likely because the First Amendment severely cabins the government's ability to force a party's speech.

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[3] Pub. L. No. 113-200, § 103(c), 128 Stat. 2059 (2014).

Any of the NPRM's proposals that directly or indirectly give the Commission the power to determine price and the availability of other consideration stretch well beyond the FCC's authority and must be summarily rejected.

The free market works effectively and efficiently. The current Commission's mantra has been that when "the facts and data determine that a market is competitive, the need for FCC intervention decreases."[4] Vibrant competition exists at every link in the video distribution chain. No credible evidence demonstrates that *de facto* FCC rate regulation and the resulting artificially low retransmission consent fees would in any way reduce consumers' bills. If the Commission did have the authority to place its fingers on the scale to exert influence in retransmission consent negotiations, which it does not, artificial changes that impede the parties' ability to negotiate a fair price for retransmission consent will ultimately harm consumers, who at the end of the day deserve to receive the high-quality programming at a cost that reflects the value of the content being provided.[5]

## II. THE COMMUNICATIONS ACT LIMITS THE FCC'S ROLE IN RETRANSMISSION CONSENT, AND STELAR DID NOT EXPAND IT.

As the Commission repeatedly acknowledged in the *Good Faith Order*, Congress purposely limited the agency's role in retransmission consent negotiations as part of the Cable Act and SHVIA. Specifically:

- Congress "does not intend to subject retransmission consent negotiation to detailed substantive oversight by the Commission."[6]

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4 *FCC Chairman Tom Wheeler Remarks at Silicon Flatirons* (Feb. 10, 2014), *available at* https://www.fcc.gov/document/fcc-chairman-tom-wheeler-remarks-silicon-flatirons.

5 Opposition of Local Broadcasters' Coalition, RM-11752, at 4 (Aug. 14, 2015).

6 *Good Faith Order*, ¶ 6.

- "The statute does not appear to contemplate an intrusive role for the Commission with regard to retransmission consent."[7]
- "When Congress first applied retransmission consent to MVPDs in 1992, it stated that 'it is the Committee's intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals; it is not the Committee's intention in this bill to dictate the outcome of the ensuing marketplace negotiations.'"[8]
- SHVIA did not "alter th[e] settled course" established by the 1992 Cable Act "and require that the Commission assume a substantive role in the negotiation of the terms and conditions of retransmission consent."[9]
- "We find it difficult to reconcile commenters' arguments that SHVIA as enacted contains a broad grant of Commission authority to analyze and prohibit the substantive terms of retransmission consent . . . ."[10]
- "Section 325(b)(3)(C) should be narrowly construed."[11]
- "Congress clearly did not intend the Commission to sit in judgement (sic) of the terms of every retransmission consent agreement executed between a broadcaster and an MVPD. Even if the Commission had the resources to accomplish such a delegation, we can divine no intent in either the statute or its legislative history to achieve such a result."[12]

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7 *Id.*, ¶ 13.
8 *Id.*, ¶ 13 (quoting 1992 Cable Act Senate Report at 36).
9 *Good Faith Order*, ¶ 14.
10 *Id.*, ¶ 18.
11 *Id.*, ¶ 20.
12 *Id.*, ¶ 23.

- "[W]e find nothing supporting a construction of Section 325(b)(3)(C) that would grant the Commission authority to impose a complex and intrusive regulatory regime . . . ."[13]
- "Congress intended that the Commission follow established precedent, particularly in the field of labor law, in implementing the good faith retransmission consent negotiation requirement. "[14] Under labor law, "the good faith negotiation requirement applies solely to the process of the negotiations," and the agency cannot "require agreement or impose terms or conditions . . . ."[15]

In short, "Congress intended that the Commission develop and enforce a process that ensures that broadcasters and MVPDs meet to negotiate retransmission consent and that such negotiations are conducted in an atmosphere of honesty, purpose and clarity of process."[16] With that in mind, the FCC adopted good faith negotiation framework rules that were "intended to identify those situations in which a broadcaster did not enter into negotiations with the sincere intent of trying to reach an agreement acceptable to both parties."[17] STELAR in no way changes the FCC's limited responsibility to focus on process, not substance.

When Congress wants the FCC to do more than "review" its rules, the statute makes that very clear. For instance, the Communications Act states that every four years, "[t]he Commission shall ***review*** its [media ownership] rules . . . ***and shall determine whether any of such rules are necessary in the public interest as the result of competition***. ***The Commission***

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13 *Id.*
14 *Id.*, ¶ 6.
15 *Id.*, ¶ 22.
16 *Id.*, ¶ 24.
17 *Id.*, ¶ 39.

***shall repeal or modify any regulation it determines to be no longer in the public interest*.**"[18] By contrast, STELAR restricts the FCC solely to a "review" of the totality of the circumstances test. Canons of statutory construction hold that "where Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[19] Moreover, as the FCC has acknowledged, "when Congress intends the Commission to directly insert itself in the marketplace for video programming, it does so with specificity."[20] STELAR contains no "particular language" to "repeal or modify" retransmission consent rules, nor does it specify that the FCC "insert itself" in the retransmission consent marketplace.

Furthermore, Congress already contemplated the so-called "significant changes in the retransmission consent marketplace" identified by the NPRM.[21] *First*, one of the stated purposes of the 1992 Cable Act was to allow broadcasters to negotiate to receive compensation for the value of their signals: "Cable systems obtain great benefits from local broadcast signals which, until now, they have been able to obtain without the consent of the broadcaster," which "has resulted in an effective subsidy of the development of cable systems by local broadcasters."[22] In explaining this "subsidy," the Senate Commerce Committee explained that "[c]able operators pay for the cable programming services they offer to their customers; the Committee believes that programming services which originate on a broadcast channel should not be treated

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18 Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996); Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004) ("Appropriations Act") (amending Sections 202(c) and 202(h) of the 1996 Act) (emphasis added).

19 *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

20 *Good Faith Order*, ¶ 23

21 *See* NPRM, ¶ 3.

22 Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460, § 2(a)(19) (1992) ("Cable Act").

differently."[23] *Second*, Section 628 of the Cable Act "directed the Commission to establish regulations for the purpose of increasing competition and diversity in multichannel video programming distribution."[24] And when Congress prohibited grants of exclusive franchises for the "promotion of competition" in the same legislation,[25] it explicitly contemplated consumer choice "among multiple MVPDs."[26] *Third*, the fact that "broadcast network television programming continues to be 'must-have' programming for MVPDs" is not a marketplace change. *Finally*, Congress in no way compelled the parties to agree to terms. As the Commission succinctly explained, "failure to reach agreement does not violate Section 325(b)(3)(C)."[27]

For all these reason, the NPRM's proposals that seek an enlarged role for the Commission in retransmission consent negotiations must be rejected.

## III. REGULATION OF ONLINE VIDEO PROGRAMMING OFFERINGS WOULD EXCEED THE COMMISSION'S AUTHORITY AND RAISE IMPORTANT FIRST AMENDMENT CONCERNS.

Media General strongly disagrees with the NPRM's proposal that limiting access to online video programming should be considered evidence of bad faith under the totality of the circumstances test.[28] The NPRM cites no statutory authority whereby the Commission could force certain video programmers to provide content online. The totality of the circumstances test that the Commission itself fashioned may not serve as a "back door" catch-all to regulate Internet

23 S. Rep. No. 102-92, at 35.

24 *See Media Bureau Seeks Comment on the Status of Competition in the Market for the Delivery of Video Programming*, DA 15-784 (rel. July 2, 2015).

25 Cable Act, § 7(a)(1).

26 NPRM, ¶ 3.

27 *Good Faith Order*, ¶ 40.

28 NPRM, ¶ 11.

content.[29] Such an unprecedented and unauthorized agency action would not only fail under judicial scrutiny, but it also would run counter to an Internet "open for commerce, innovation, and speech."[30] As Commissioner Pai stated in recent Congressional testimony, the FCC's "tremendously wise approach" has been that "[w]e don't regulate the content that over-the-top providers offer. We don't regulate prices. And we don't regulate business models. We leave those decisions to the market—to the aggregated choices of millions of Internet-savvy consumers."[31]

Additionally, such compelled commercial speech, even if hidden as a factor in the totality of the circumstances test, would raise First Amendment concerns.[32] Thus, not only would regulating Internet content as the NPRM proposes be unconstitutional, it would also be absent Congressional authority.

## IV. BROADCASTERS SHOULD BE FREE TO OFFER CARRIAGE OF AFFILIATED AND MULTICAST NETWORKS TO MVPDS.

A broadcaster's offer to an MVPD to bundle broadcast signals with other broadcast signals or cable networks is permissible under the Communications Act and Commission precedent. Many Media General stations utilize their spectrum to carry free, OTA multicast networks, including Bounce TV, Sky Link TV, ION, Grit, Escape, and LAFF. Multicasts contain additional, valuable programming, such as WANE-TV's broadcast of 55 White Sox

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29 *Good Faith Order*, ¶ 32.

30 *Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601, ¶ 1 (2015).

31 *Testimony of Ajit Pai, FCC, Before the Subcommittee on Communications and Technology of the U.S. House of Representatives Committee on Energy and Commerce* (Nov. 17, 2015), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db1117/DOC-336418A1.pdf.

32 *See Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47 (2006).

games on its secondary stream and multiple stations' provision of 24/7 weather coverage.[33] It is common for Media General to offer options to MVPDs to carry one or more multicast networks at different price points, a pro-competitive practice that cuts down on transaction costs for MVPDs.

The FCC has held that:

> "[c]onsistent with our determination that Congress intended that the Commission should enforce the process of good faith negotiation and that the substance of the agreements generally should be left to the market, we will not adopt the suggestions of certain commenters that we prohibit proposals of certain substantive terms, such as offering retransmission consent in exchange for the carriage of other programming such as a cable channel, another broadcast signal, or a broadcaster's digital signal."[34]

With this in mind, Media General is unaware of any widespread practice of conditioning retransmission consent of its primary channel only on carriage of an affiliated station or multicast stream. Absent evidence of anti-competitive behavior, the Commission is without authority to prohibit the offering of multicast networks for carriage.

## V. THE FCC HAS NO AUTHORITY TO REQUIRE BROADCASTERS TO FURNISH PROGRAMMING TO MVPDS.

The NPRM asks whether "a broadcaster's insistence on contract expiration dates, or threats to black out a station signal, in the time period just prior to the airing of a 'marquee' sports or entertainment event" should be considered "inconsistent with the statutory duty to bargain in good faith."[35] This proposal is based on a misunderstanding of the dynamics of retransmission consent negotiations, would be impractical to implement, and would extend beyond the Commission's authority. Therefore, it should be rejected.

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33 Chicago White Sox, TV Affiliates, *available at* http://chicago.whitesox.mlb.com/cws/schedule/tv_affiliates.jsp.

34 *Good Faith Order*, ¶ 39.

35 NPRM, ¶ 16.

At the outset, Media General takes issue with the premise that service interruptions are a symptom of broadcasters acting in bad faith and instead agrees that there is "economic incentive for each side to reach agreement."[36] Broadcasters benefit from cable carriage of their signals, and MVPDs benefit from carrying broadcast programming. Thus, while both parties desire a mutually beneficial outcome, the Communications Act does not compel either party to agree to terms and conditions proposed by the other party.[37] Characterizing service interruptions as solely a broadcaster "threat" not only ignores this basic premise of negotiation, it is belied by the evidence. Between 2010 and January 2015, 70% of the negotiation impasses charted by American Television Alliance occurred with three MVPDs: Dish Network, DIRECTV, and Time Warner Cable.[38]

*First*, a contract's term is a provision that has been bargained for by both parties to a retransmission consent agreement at the time the agreement is signed. The FCC is not a party to the agreement, and it does not have authority to directly or indirectly amend the expiration date.

*Second*, the Commission has no authority to require broadcasters to forego their statutory retransmission consent rights or to force them to grant carriage at any time. Section 325(b)(1) of the Act states that "[n]o cable system or other multichannel video programming distributor shall retransmit the signal of the broadcasting station, or any part thereof, except . . . with the express authority of the originating station . . . ."[39] The Commission made clear that it based the good

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36 *Good Faith Order*, ¶ 22 (quoting National Labor Relations Act § 8(d), 29 U.S.C. § 158(d)).

37 *Good Faith Order*, ¶ 40.

38 American Television Alliance, Blackout List 2010 – 2015, *available at* http://www.americantelevisionalliance.org/wp-content/uploads/2013/05/ATVA-Comprehensive-List-of-Broadcaster-Retrans-Blackouts-2010-20155.docx.

39 47 U.S.C. § 325(b)(1).

faith negotiating rules on analogous labor laws, such as the Taft-Hartley Act, which "does not compel either party to agree to a proposal or require the making of a concession."[40]

*Finally*, what exactly would constitute a "marquee sports or entertainment event" is a question that will be ever in search of an answer. Will it include any professional sporting event? Any collegiate basketball or football game? Any awards show? The Jenner-Sawyer interview? Finales of *The Bachelor*, *The Voice*, or *American Idol*? Regular episodes of the ten highest-rated network comedies and dramas? Presidential debates? Donald Trump hosting *Saturday Night Live*? Even if "marquee sports or entertainment events" could be defined, they would be impossible to plan around and avoid when negotiating a long-term contract. While the dates and availability of certain sporting events on broadcast television may be available years in advance, others, like *Thursday Night Football*'s move to CBS, would not. Moreover, the dates and time slots of debates, season finales, and programs tied to current events are unknown at the time a contract is negotiated.

Inherent in the NPRM's "marquee event" proposal is further acknowledgement by the FCC that broadcast networks provide valuable, high-quality programming. The Commission possesses no authority to mandate that when broadcast signals achieve the apex of their value, they must be provided to MVPDs for free.

## VI. A BROADCASTER ACTING UNDER STATUTORY OR FCC AUTHORITY ACTS IN GOOD FAITH.

The NPRM seeks comment on whether it would be "inconsistent with the statutory duty to bargain in good faith" for a broadcaster to exercise either the statutory right to prevent importation of a distant signal (for satellite carriers) or the codified right of network non-

40 National Labor Relations Act § 8(d), 29 U.S.C. § 158(d).

duplication or syndicated exclusivity (for cable and telecommunications MVPDs).[41] Compliance with existing statutes and Commission rules is the definition of good faith bargaining. Broadcast stations negotiate geographic exclusivity protections with networks and syndicators, and the exclusivity rules provide an efficient, effective enforcement mechanism to prevent MVPDs' carriage of duplicative local broadcast programming. This fosters localism, allowing broadcasters to provide high-quality local news and information to their communities. In fact, Media General's stations broadcast 1,780 hours of local news per week.

By contrast, where an MVPD imports a distant signal, it knowingly causes a broadcaster to breach the geographic exclusivity protections of its network affiliation agreement, a practice inconsistent with good faith bargaining. Media General agrees with the Texas Association of Broadcasters that "the very definition of bad faith is an MVPD claiming it has obtained the right to export programming to other markets from a TV station that it knows full well never had those rights to give to it in the first place."[42]

## VII. THE FREE MARKET FOR RETRANSMISSION CONSENT PROTECTS CONSUMERS.

The NPRM asks whether "causing consumers harm to enhance negotiating leverage generally [should] be a factor that we should consider as evidence of bad faith under the totality of the circumstances test."[43] The current framework for retransmission consent works to consumers' benefit, and additional regulation is unnecessary. As a 2014 independent economic assessment concludes, "allowing broadcasters to be compensated for their investments in

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41 NPRM, ¶ 16, n.79.

42 Texas Association of Broadcasters, Ex Parte Notification, MB Docket No. 10-71, at 9 (Sept. 9, 2015).

43 NPRM, ¶ 11.

programming is good economics . . . [and] enhance[s] consumer welfare by creating a more efficient and robust market for digital content of all types."[44]

The free market for retransmission consent protects consumers who choose to enter a contractual relationship with MVPDs for video subscription service. Retransmission consent recognizes the value of video programming, and competition has increased between MVPDs, as Congress intended.[45] If consumer demand for a broadcast station's content is low, the price a broadcaster receives for carriage will reflect that lower demand. Conversely, if the demand for a broadcast station's content is high, a broadcaster should realize the benefit of higher retransmission consent rates, the MVPD should realize higher subscription rates, and the consumer will receive higher content value. Accordingly, the concept of "consumer harm" should not be a proxy for MVPDs to complain about the fair market value of content, nor should it be used to force an agreement upon either party to a retransmission consent negotiation.

In addition, the vague standard of "consumer harm" would overwhelm the FCC with oversight duty over every retransmission consent negotiation. Not only would the Commission have to examine each term and condition of an agreement for "consumer harm," but it would also have to vet which party caused such "consumer harm." Congress did not intend "detailed substantive oversight by the Commission," and instead favored that "retransmission consent negotiations [be] the market through which the relative benefits and costs to the broadcaster and

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[44] Jeffrey A. Eisenach, Ph. D., *Delivering for Television Viewers: Retransmission Consent and the U.S. Market for Video Content*, at 1 (July 2014), *available at* http://www.freetv.com.au/media/NERA_RESEARCH_Delivering_for_Television_Viewers_Retransmission_Consent_and_the_US_Market.pdf.

[45] *See supra* note 24.

MVPD are established."[46] With that in mind, the NPRM's "consumer harm" proposal should be rejected.

## VIII. THE NPRM'S PROPOSALS WOULD HARM THE PUBLIC INTEREST.

Even assuming *arguendo* that the Commission had statutory authority to implement the NPRM's proposals, their result – artificially-depressed retransmission consent fees, migration of high-quality programming to pay networks, and harm to localism – contravene the public interest.

Broadcast television is available over-the-air for free and has the potential to reach 100% of U.S. television homes. Vigorous competition between broadcasters, pay-cable networks, and pay-over-the-top ("OTT") providers like Netflix, Hulu, Amazon, and Yahoo continues to escalate the cost of premier video programming rights. Media General stations also compete to be the preeminent providers of local news, sports, weather and emergency information in their markets. For example, the Radio Television Digital News Association recently honored WSLS-TV (Roanoke, Va.) with a national Edward R. Murrow Award and 11 other Media General stations with 22 regional Murrow Awards.[47] The company also further bolstered its newsgathering efforts in May, opening its Washington D.C. bureau to provide breaking news, political updates and analysis, and in-depth investigative reporting.[48]

Retransmission consent fees, which remain at a discount to affiliate fees charged by many cable networks for similar and lower-rated programming, offset these high programming costs and "allow[] broadcasters to retain (or regain) rights to programming, especially sports

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[46] *Good Faith Order*, ¶ 53.

[47] *Media General's WSLS-TV Wins National Edward R. Murrow Award* (June 26, 2015), *available at* http://mediageneral.com/press/2015/june26_15.html.

[48] *Media General Announces New Washington, D.C. Bureau and Names Jim Osman as Bureau Chief* (May 18, 2015), *available at* http://mediageneral.com/press/2015/may18_15.html.

programming, that would not otherwise have been available on free over-the-air television."[49] To wit, 47 of the 50 highest-rated television series aired on local broadcast television stations in the 2014-15 season.[50] Largely out of the public view, and under the current good-faith bargaining regime, Media General has successfully negotiated carriage of its stations and this programming with MVPDs big and small across the country.

More fundamentally, any perceived cuts to consumers' MVPD bills are illusory. MVPDs will continue to charge consumers based upon the value of the content they deliver regardless of the amount they pay for it or from whom they receive it. If the government limits what broadcasters can charge for high-quality programming, the programming will migrate to cable networks. MVPDs will pay for the right to carry the programming either way, but the unintended harm would be to those who rely on OTA television, almost half of whom have annual incomes of less than $30,000.[51] Such a result would not serve the public interest.

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49 Jeffrey A. Eisenach, Ph.D., *Delivering for Television Viewers: Retransmission Consent and the U.S. Market for Video Content*, NERA Economic Consulting, at 29-30 (July 2014).

50 TV Insider, *These are the 50 Most-Watched TV Shows of the 2014-15 Season*, at http://www.tvinsider.com/article/1989/top-50-tv-shows-2014-2015-highest-rated-winners-and-losers/

51 *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, 22 FCC Rcd 21064, ¶ 6 (2007).

## IX. CONCLUSION.

The current good faith bargaining rules have fostered an efficient marketplace for retransmission consent negotiations. The rules work, and there is not a need to update the totality of the circumstances test. Adopting any of the NPRM's proposals that would provide a substantive role for the Commission in retransmission consent negotiations would exceed the agency's authority and harm consumers and should be rejected.

Respectfully Submitted,

**Media General, Inc.**

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